PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name BRAXTON, Michael G.
(Last) (First) (Initial)

Prisoner Number T-26973

Institutional Address P.O. Box 2210 Susanville, CA 96127

E-filing

1742 PJH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL GLENN BRAXTON
(Enter the full name of plaintiff in this action.)

vs.

KATHY PROSPER (Warden)

(Enter the full name of respondent(s) or jailor in this action)

CV 08 1742

Case No. _____
(To be provided by the clerk of court)

PETITION FOR A WRIT OF HABEAS CORPUS

PJH

(PR)

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Solano County Superor Court — Fairfield, CA

Court — Location

(b) Case number, if known FCR - 178124

(c) Date and terms of sentence August 2001 - 34 yr.- Life

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes XX No ____

Where?

Name of Institution: California Correctional Center

Address: P.O. Box 2210 Susanville, CA 96127

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

1. Attempted Murder (Pen C. § 664, 187(a)

2. Intentional Discaharge of FIrearm (Pen C § 12022.7(a), 12022.33 (d) (Causing Great Bodily Injury)

3. Did you have any of the following?

Arraignment: Yes XX No ____

Preliminary Hearing: Yes XX No ____

Motion to Suppress: Yes ____ No XX

4. How did you plead?

Guilty ____ Not Guilty XX Nolo Contendere ____

Any other plea (specify) N/A

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone____ Judge alone on a transcript ____

6. Did you testify at your trial? Yes XX No ____

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes XX No ____

(b) Preliminary hearing Yes XX No ____

(c) Time of plea Yes XX No ____

(d) Trial Yes XX No ____

(e) Sentencing Yes XX No ____

(f) Appeal Yes XX No ____

(g) Other post-conviction proceeding Yes XX No ____

8. Did you appeal your conviction? Yes XX No ____

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes XX No ____

Year: 2005 Result: Judgment Affirmed

Supreme Court of California Yes XX No ____

Year: 2007 Result: Pet. for Review Denied

Any other court Yes ____ No ____

Year: ____ Result: ____

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes ____ No XX

(c) Was there an opinion? Yes ____ No XX

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes ____ No XX

If you did, give the name of the court and the result:

N/A

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes ____ No XX

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result: _____ Date of Result: _____

II. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a._____

b._____

c._____

d._____

Result: _____ Date of Result:_____

III. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a._____

b._____

c._____

d._____

Result: _____ Date of Result:_____

IV. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a._____

b._____

c._____

d._____

Result: _____ Date of Result:_____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes ____ No XX

Name and location of court: _____

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim One: See Attachment A

Supporting Facts:

Claim Two: See Attachment B

Supporting Facts:

Claim Three: See Attachment C

Supporting Facts:

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

All claims and issues presented have been presented to the lower courts for review and disposition.

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim 4 See Attachment D

Supporting Facts:

Claim 5 See Attachment E

Supporting Facts:

ATTACHMENT A

I.

REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT'S IMPOSITION OF THE UPPER TERM FOR ATTEMPTED MURDER VIOLATED THE SIXTH AMENDMENT, UNDER THE SUPREME COURT'S RECENT DECISION IN *CUNNINGHAM v. CALIFORNIA*

On June 14, 2001, a jury convicted appellant of attempted murder, and it found true enhancements for personal discharge of a firearm causing great bodily injury and for personally inflicting great bodily injury. (Pen. Code, §§ 664, 187; 12022.53, subd. (d); 12022.7, subd. (a).)

At sentencing on August 9, 2001, the trial court sentenced appellant to a term of 34 years to life in prison. It arrived at that sentence by selecting the upper term for attempted murder (9 years) and then adding a consecutive term for the firearm enhancement (25 year to life). In choosing the upper term, the court stated:

> "[U]pon my review of the factors in aggravation and the factors in mitigation, the Court notes the probation report on page seven cites Rule 4.421(b)(1) for the proposition that the defendant has engaged in violent conduct which indicates a serious danger to society. That includes the current offense, as well as offenses conducted by the defendant in his past. Under Rule 4.421(b)(2), the defendant's prior convictions are numerous. Those are factors in aggravation."

(8/9/01 RT 21.)

Thus, the trial court relied upon several factors to impose the upper term here: (1) that appellant had "engaged in violent conduct," including both "the current offense" and "past" offenses, (2) that these offenses "indicate[] a serious danger to society," and (3) that appellant's prior convictions were "numerous."

According to the probation report, appellant appeared to have two prior felony convictions. First, in 1971 (28 years before the commission of the current offense), he had been arrested for assault with intent to commit

murder, to which he had "pled" not guilty by reason of insanity and had been committed to Atascadero State Hospital. Second, in 1982 (17 years before the current offense), appellant had been convicted of felony assault. Appellant had also incurred several misdemeanor convictions: for resisting arrest in 1970 (§ 148), for possession of a loaded firearm in 1977 (§ 12031), for driving under the influence (twice in 1985, once in 1994), and for storing a firearm accessible to children in 1995 (§ 12035).[1]

While appellant was before this Court in the second stage of his initial appeal (and after the case was fully briefed there on an issue unrelated to sentencing), the United States Supreme Court decided *Blakely v. Washington* (2004) 542 U.S. 296, holding that a Washington state sentencing judge could not impose an enlarged prison term based on the judge's own determination that the defendant exhibited "deliberate cruelty" in the offense for which he was being sentenced. About six months later (and after this Court had decided the unrelated issue in appellant's case), the United States Supreme Court decided *United States. v. Booker* (2005) 543 U.S. 220, applying the *Blakely* holding to the federal sentencing guidelines. Very shortly thereafter, however, this Court ruled that the principles announced in *Blakely* and *Booker* did not invalidate the way in which California's Determinate Sentencing Law allowed

---

[1] Both the body of the probation report and the attached rap sheet state merely that appellant had "pled" not guilty by reason of insanity to the attempted murder charge in 1971. Both also indicate appellant went to Atascadero State Hospital in connection with the charge. The trial court presumably concluded that appellant was actually *found* not guilty by reason of insanity and that this amounted to a conviction. (See § 1016 [entry of insanity plea, without not guilty plea, "admits the commission of the offense charged"]; former § 1026, as amended by Stats. 1963, ch. 2128, p. 4418, § 1 [in effect in 1971] [if defendant pleads not guilty in addition to not guilty by reason of insanity, the not guilty plea is litigated first].)

judges to select the upper term in DSL cases. (*People v. Black* (2005) 35 Cal.4th 1238.

This was the state of affairs throughout the instant appeal. There was binding authority from this Court, holding that the DSL scheme for imposing upper terms in this state was constitutional.

The state of affairs changed completely, however, on January 22, 2007, eight days before the Court of Appeal issued its decision in this case. In *Cunningham v. California* (2007) 127 S.Ct. 856, the United States Supreme Court overruled the *Black* decision. The fundamental principle underlying *Cunningham* was that "[e]xcept for a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 868, internal quotation marks omitted.) And "[c]ontrary to the *Black* court's holding," the High Court ruled, "the middle term specified in California's statutes, not the upper term, [is] the relevant statutory maximum." (*Id.* at p. 871.) Thus, "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 871)

The *Cunningham* decision is fully applicable to the present appeal. (*Griffith v. Kentucky*, *supra*, 479 U.S. 314.)

As the first of the above-quoted sentences from *Cunningham* indicates, there is an exception to the constitutional requirement that aggravating factors have to be submitted to a jury and found true beyond a reasonable doubt. The exception involves "the fact of an earlier conviction." (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 226; see also *United States v. Booker*, *supra*, 543 U.S. at p. 231 ["the fact of an earlier conviction"]; *Blakely v. Washington*, *supra*, 542 U.S. at p. 301 [same]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [same].) This exception is read very narrowly. It applies

only to the mere fact of a prior conviction. (*Shepard v. United States* (2005) 544 U.S. 13, 24.)

However, the factors upon which the sentencing judge relied to impose the upper term on appellant were not "the fact of an earlier conviction." As indicated earlier, the judge based her selection of the upper term on her conclusions that appellant had "engaged in violent conduct" (including both "the current offense" and "past" offenses), that this violent conduct "indicates a serious danger to society," and that appellant's prior convictions were "numerous." (8/9/01 RT 21.) Of course, the fact that appellant engaged in violent conduct in "the current offense" cannot begin to justify the selection of the upper term, because, by definition, violent conduct is inherent in the current conviction.

As for the trial court's conclusion that appellant "had engaged in violent conduct" in his past offenses, this is *not* inherent in those convictions and is beyond "the fact of [the] earlier conviction." For example, for all that could be told from "the fact of the earlier conviction," appellant could have been a mere aider and abettor in those prior cases. Indeed, since both prior convictions preceded the landscape-altering decision in *People v. Beeman* (1984) 35 Cal.3d 547, appellant could have been convicted as an aider and abettor on grounds that would be insufficient to sustain criminal liability at all in the post-*Beeman* era. Thus, the sentencing judge in the present case had to make factual determinations beyond "the fact of the earlier convictions" in order to rely on the purported fact that appellant "had engaged in violent conduct" in his past offenses.

The situation is at least as clear with regard to the remaining factors relied on by the sentencing court. That appellant's current and prior offenses purportedly "indicate[] a serious danger to society" is not part of "the fact of the earlier convictions." Continuing present dangerousness is a factual matter

that is not inherent either in the present case or, particularly given the remoteness in time, in "the fact of the earlier convictions." It was, thus, a matter for jury determination under *Cunningham*.

Similarly, the "numerous" characterization of appellant's prior convictions is a question of fact for the jury. The concept of numerosity goes beyond the mere fact of an earlier conviction, and here, as appellant's counsel pointed out below, appellant had committed no crimes related to violence for nearly two decades before the present offense, and no offenses serious enough to rise to the level of a felony. Thus, whether appellant's prior convictions were "numerous" is a fact that must be determined by a jury. (See *Cunningham*, *supra*, 127 S.Ct. at p. 863 ["the California Supreme Court has repeatedly referred to circumstances in aggravation as facts"], 869, fn. 14. ["*[A]ny* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"] (emphasis in *Cunningham*, quotation marks omitted).)

Under *Cunningham*, the trial court's selection of the upper term violated the Sixth Amendment. Review should be granted to address the issue.

ATTACHMENT B

II.

REVIEW SHOULD BE GRANTED BECAUSE OF THE ADMISSION OF EVIDENCE THAT, TWO WEEKS BEFORE THE CHARGED OFFENSE, APPELLANT HAD TOLD POLICE OFFICERS THAT HE HAD HAD THE NICKNAME OF "HIT MAN" 30 YEARS EARLIER AND THAT HE HAD SHOT AT PEOPLE IN THE PAST

In the present case, appellant was accused of the attempted murder, on September 14, 1999, of an employee of the trailer park where he had been living for the past several years. Two days earlier (on September 12), appellant had been served with a notice that he was being evicted from the park. The cause of the eviction was the fact that, on August 30, he had fired a weapon into the ground shortly after he had had an run-in with neighbors. Police had been called in connection with the August 30th incident, and in talking with officers, appellant stated that he had had the nickname of "the hit man" when he was a teenager (three decades earlier) and that he had shot at people in the past.

Evidence of these statements was proffered at appellant's trial. The defense objected that the evidence was irrelevant and was inadmissible under Evidence Code section 352. In response, the prosecutor contended the evidence was probative of appellant's "state of mind." (RT 12.) The prosecutor explained that the evidence showed "how [appellant] viewed himself in terms of his relation to those around him" and that "in fact his way of acting out on that opposition was by getting drunk and using a firearm." (RT 12-13.) Thus, according to the prosecutor, the statement showed appellant's "acquaintanceship [with] and his willingness to use firearms." (RT 13.) The trial court overruled appellant's objections and admitted the statement. (RT 14.)

The prosecutor could scarcely have articulated any more clearly the inadmissibility of that evidence. The fact that the prosecutor intended to use

the evidence as proof of appellant's "way of acting out" and his "willingness to use firearms" demonstrates the impropriety of the admission of the evidence, under state law and under the Due Process, Equal Protection, and fair jury trial provisions of the federal Constitution.[2] These rationales were explicit efforts to show appellant's character and propensities and thus to prove that he acted in accordance with those traits on September 14th. On their face, they establish the impropriety of admitting the evidence, and the error is only compounded by the fact that the nickname had existed only in the remotest past — 30 years earlier, when appellant had been a teenager.

The Court of Appeal in this case viewed the evidence as admissible to show appellant's mental state at the time of the charged offense (involving a non-neighbor two weeks later) because appellant's statements "constituted, effectively, a generic threat to do harm." (Slip Opn. at p. 13.) This reasoning is effectively a rewording of the prosecutor's arguments. It actually confirms the validity of appellant's claim.

---

[2] See, e.g., *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.

ATTACHMENT C

III.

REVIEW SHOULD BE GRANTED BECAUSE THE INSTRUCTIONS LED THE JURY TO MISUNDERSTAND THAT IT WAS NOT TO "DEAL WITH" NECESSARILY INCLUDED OFFENSES UNLESS IT "UNANIMOUSLY FIND[S] THE DEFENDANT NOT GUILTY OF THE GREATER CRIME." IF THE INSTRUCTIONS WERE NOT MISLEADING, THEN A NEW TRIAL SHOULD HAVE BEEN GRANTED BECAUSE JURORS DELIBERATELY MISREPRESENTED THE INSTRUCTIONS DURING DELIBERATIONS

It is appellant's contention that either (1) the instructions given the jury regarding the order in which it could deliberate on the charged and necessarily included offense were prejudicially misleading and thus violated state law and the Due Process, Equal Protection, and jury trial provisions of the United States Constitution, or (2) jurors committed misconduct, in violation of federal constitutional rights to Due Process and a fair trial by jury, by deliberately misrepresenting the instructions during deliberations.

The claim of instructional error is based primarily upon the language used in the instructions.

The juror misconduct claim is based on juror declarations, submitted to the trial court at the motion for new trial, depicting statements made during deliberations, admissible under Evidence Code section 1150 because they show an "'express agreement' to violate the court's instructions" or at least "'extensive discussion evidencing an implied agreement to that effect.'" (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683-1684, quoting *Krouse v. Graham* (1977) 19 Cal.3d 59, 81.) The declarations showed (1) that some jurors refused to discuss the necessarily included assault charge throughout the deliberations, insisting that the judge had forbidden the jury to consider the charge until it first unanimously agreed that appellant was

not guilty of attempted murder and (2) that at least three other jurors acquiesced in that refusal even though they understood the jury had not been so forbidden. If, contrary to appellant's claim of instructional error, the instructions did clearly convey the order-of-deliberations principles required by the Constitution and by *People v. Kurtzman* (1988) 46 Cal.3d 322, then the juror declarations were admissible to show, and did show, that some or all jurors committed misconduct.

The Court of Appeal concluded that the instructions were proper. (Slip Opn. at pp. 15-16.) However, the court did not consider all the instructions, including most of the ones on which appellant's contention rested (as appellant pointed out in his petition for rehearing at pages 8-10). It is at least reasonably probable that, as a result of the court's instructions, the jury concluded it was precluded from considering the lesser assault charge unless it had first unanimously agreed that the defendant was not guilty of attempted murder, a misunderstanding that resulted in violations of both state law and the due process, equal protection, and fair trial provisions of the federal Constitution. To understand how the jury came to this conclusion, it is necessary to follow the sequence of instructions.

In instructing the jury just prior to deliberations, the trial court initially explained that the jury had to "determine" whether appellant was "guilty or not guilty of the crime charged or of any lesser crime" and that the jurors had "discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it." The court then advised the jury — twice — that the court "cannot accept a guilty verdict on any lesser crime unless you have

unanimously found the defendant not guilty of the greater crime."[3] (RT 716; CT 140; see CALJIC No. 17.10 (6th ed. 1996).)

To the average lay person, the distinction the instruction sought to draw between (1) *evaluating* and *considering* crimes and (2) making *findings* about guilt or innocence was not an intuitively obvious proposition. At the very least, although the terse language of the trial court's instruction conformed to CALJIC No. 17.10, it left room for misunderstanding.

And the opportunity for misunderstanding would only expand as the pre-deliberation charge continued. For, shortly after delivering CALJIC No. 17.10, the trial court delivered its own, non-CALJIC instruction to explain the verdict forms. (RT 719-721.) This instruction told the jury that "the first question presented on your verdict form" would be whether appellant was guilty or not guilty of attempted murder as charged in Count One. (RT 719.) It further advised the jurors that "only if you have found the defendant not guilty of attempted murder" would they "answer" the question whether appellant was guilty or not guilty of "the lesser" crime of assault with a firearm. (RT 721.)

---

[3] In relevant part, the instruction as delivered read, "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, that is attempted murder, you may nevertheless convict him of any lesser crime . . . . Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged or of any lesser crime. In doing so, you have the discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict. However, this Court cannot accept a guilty verdict on any lesser crime unless you have unanimously found the defendant not guilty of the greater crime. [¶] Let me state that one more time. [¶] This Court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged greater crime" (RT 715-716.)

Not only did this instruction appear to specify a sequence to addressing the crimes (with attempted murder being "the first question presented" to the jury), but to a layperson, the latter part of the instruction would be understood as contradicting what the jurors had been told in the earlier instruction that tracked CALJIC No. 17.10. For, although the CALJIC No. 17.10-based instruction had authorized the jury to "reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict" (RT 716), the non-CALJIC, verdict-form instruction forbid the jury from giving any "answer" (i.e., from reaching any "conclusion") with respect to the assault-with-a-firearm offense unless it had reached a final determination of not guilty with respect to the attempted murder charge (RT 721).

This was the state of affairs when the jury began its deliberations. And the problems mounted after the jury sent out a note during deliberations, asking: "Were There 2 Counts Against the Defendant? (Attempted Murder and Assault)." (Conf. CT 101; RT 738.) In responding to this question, the trial court misstated the law with respect to the order of jury deliberations and then apparently tried (unsuccessfully) to correct the misstatement.

In its initial response to the jury's question, the trial court expressly tied the jury's consideration of the charges to the sequence of the verdicts. The court told the jury that only attempted murder was charged in the Information and that assault with a firearm was not charged but was "before you for consideration," along with two special allegations. The court then continued:

> "So those are the two special allegations to be considered *if the jury gets to the point of considering assault with a firearm*. And I say '*if the jury gets to that point*' because I instructed you that you can only bring back a verdict on assault with a firearm if you unanimously find the defendant not guilty of the charged crime. Under our law, with respect to the charged crime, if the jury were to find the defendant guilty of the charged crime and to address the enhancements of the charged crime, *there's no need* to go any further *to deal with the crime of assault with a firearm*. You only get to the assault with a firearm

point for a verdict if you have unanimously found him NG of the charged greater crime.

"So, does that clarify what was charged and what was not and the relationship between the two crimes? One is the greater crime of attempted murder with the enhancements. And if there is a finding of guilt as to that and the enhancements are addressed, there's *no need to deal with the lesser crime.*

"*You only deal with the lesser crime if you unanimously find the defendant not guilty of the greater crime. If you do that, then you move on and then you ask -- consider and deliberate as to whether or not it was proved beyond a reasonable doubt that the lesser crime was committed.*"

(RT 739-740 [emphasis added].)

With the judge having explicitly directed that the jury was to "move on and . . . consider and deliberate" on the assault charge *only* after "finding the defendant not guilty of the greater crime," defense counsel asked to approach the bench. Thereafter (the bench conference was unreported), the trial court stated the following:

"Ladies and Gentlemen of the jury, there was a jury instruction that I read to you that said that while you're deliberating you can look at both crimes, you can look at the evidence as to both crimes and you can decide the order in which you're going to evaluate the crimes.

"But in terms of the verdicts that you can bring back to the Court, this Court cannot accept a verdict on the lesser crime until you have unanimously found the defendant not guilty of the greater crime. And, again, if there is a finding of guilt as to the greater crime, there's *no need to go any further to deal with the lesser crime.*

"But in terms of how you choose to look at the crimes before you get to the point of actually rendering a verdict, you can debate and evaluate them in any order that you want. It's just that I can't accept a verdict on the lesser crime *until* there's been a unanimous finding by you that the defendant is not guilty of the greater crime."

(RT 741 [emphases added].)

In these five sentences, the trial court was apparently attempting to correct the immediately preceding charge to the jury, but it is highly unlikely that any juror would have had his or her misunderstanding corrected. For one thing, the court never expressly told the jurors that what it had just told them about the order of deliberations — that they could "consider and deliberate" on the assault charge only after reaching a verdict on attempted murder (RT 740) — was actually wrong. Rather, the court merely tried to paraphrase what it had said much earlier, in a pre-deliberation instruction, without acknowledging that the more recent charge was erroneous.

Even then, the paraphrasing of the pre-deliberation instruction was inconsistent because, in the middle of it, the court reiterated that "if there is a finding of guilt as to the greater crime, there's *no need to go any further to deal with the lesser crime.*" (RT 741 [emphasis added].)

The upshot is that it is at least more likely than not that the jury believed it could not deliberate on the assault offense unless it first unanimously acquitted appellant of the attempted murder charge. And that, of course, constitutes error.

But if there is no reasonable likelihood that the jury was confused or that jurors misconstrued or misapplied the order-of-deliberations instructions, then the evidence in the jury declarations admits of only one conclusion: the jurors must have been agreeing not to follow the judge's instructions. For, if there was no confusion or misunderstanding, then the jurors who insisted that the judge had "instructed us that we were not allowed to consider" the lesser charge "until we had unanimously agreed that Mr. Braxton was not guilty of attempted murder" must have known that the judge had done no such thing. And the three declarants who agreed to go along with these jurors must have known this as well, since they, too, were not confused about the meaning of the instructions. At the very least, an evidentiary hearing is required into the question of misconduct.

ATTACHMENT D.

IV. REVIEW SHOULD BE GRANTED BECAUSE OF THE TRIAL COURT'S REFUSAL TO INSTRUCT ON ATTEMPTED VOLUNTARY MANSLAUGHTER

Appellant was charged with attempted murder, i.e., with having attempted to kill "unlawfully and with malice aforethought." (CT 15; see § 187, subd. (a).) Because the charged offense was an attempt, a specific intent to kill was required for a conviction, and thus the jury was correctly instructed only on *express* malice aforethought, and not on *implied* malice. (See RT 711; see § 188.)

Defense counsel requested that the jury also be instructed on the lesser offense of attempted voluntary manslaughter. (RT 602; see § 192, subd. (a).) Counsel agreed that there was no evidence of provocation, but he insisted that the defense was entitled to an instruction on attempted voluntary manslaughter because there was evidence from which the jury could conclude that, although an intent to kill was present, malice had been negated. (RT 606, 607-608.)

The trial court refused the defense's proffered instruction, ruling that in the absence of provocation or imperfect self-defense, there could be no crime of attempted voluntary manslaughter. (RT 602:26-603:6, 606:1-12.) The court did instruct the jury on the general intent crime of assault with a firearm. (RT 715-718.)

The trial court was in error about attempted voluntary manslaughter. An intentional killing *can* be a voluntary manslaughter (and hence an attempted killing can be attempted voluntary manslaughter) even in the absence of provocation or imperfect self-defense. (*People v. Rios* (2000) 23 Cal.4th 450.) As *Rios* made clear, "[p]rovocation and imperfect self-defense

are not additional elements of voluntary manslaughter which must be proved and found beyond a reasonable doubt in order to permit a conviction of that offense." (23 Cal.3d at pp. 469-470; *id.* at p. 468 fn. 13 ["provocation is not an element of voluntary manslaughter"].) Rather, "a conviction of voluntary manslaughter is supported by proof and findings . . . that the homicide was unlawful and intentional." (*Id.* at p. 454.) "[A] conviction of voluntary manslaughter can be sustained under instructions which require, and evidence which shows, that the defendant killed intentionally and unlawfully." (*Id.* at p. 463.) "[I]f the evidence shows an intentional criminal homicide, but malice is not established, the accused is appropriately convicted of *voluntary* manslaughter." (*Id.* at p. 469.) "We hold that a conviction of voluntary manslaughter may be sustained upon proof and findings that the defendant committed an unlawful and intentional homicide." (*Id.* at p. 469.)

Thus, the trial court deprived appellant of his federal constitutional rights to Due Process, Equal Protection, and a fair jury trial when it refused to instruct on attempted voluntary manslaughter.

ATTACH E

V.

REVIEW SHOULD BE GRANTED BECAUSE OF THE CUMULATIVE EFFECT OF THE ABOVE ERRORS AND/OR OTHER CONSTITUTIONAL VIOLATIONS IN THE IMPROPER ADMISSION OF ADDITIONAL EVIDENCE AND THE GIVING OF OTHER IMPROPER JURY INSTRUCTIONS

Assuming arguendo that a new trial is not required as the result of any of the preceding claims, a reversal would nevertheless be required because of the cumulation of errors that occurred in this case. Not only does the totality of federal constitutional errors mandate a reversal under *Chapman* and as a matter of Due Process, Equal Protection, and the right to fair jury trial, but the same conclusion must be reached even if the errors are viewed as state law error. State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."[4] In any event, the state law errors, considered together, also compel the conclusion under *Watson* that a different result more likely would have occurred in the absence of the errors. It is established that the combined effect of instructional errors and/or evidentiary errors may create cumulative prejudice. (See, *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798.)

The cumulation of errors must take into account the errors the Court of Appeal found, which included four errors in the admission of evidence and the giving of jury instructions. (Slip Opn. 10-12, 13-14, 18-19, 19-20.) These

---

[4] *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286-88; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814 footnote 6; *Menzies v. Procunier* (5th Cir. 1984) 743 F.2d 281, 288-289; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Rose v. Lundy* (1982) 455 U.S. 509, 531 footnote 8, concurring opinion; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-43.

consisted of errors in (1) admitting evidence of the details of the August 30th incident in which appellant fired his weapon into the ground, (2) admitting testimony of appellant's estranged wife that he was a "violent drunk" and had "a Dr. Jekyll and Mr. Hyde personality," (3) instructing the jury on appellant's supposed failure to explain or deny evidence against him, and (4) instructing the jury on appellant's purported pre-offense statements of intent, plan, motive, and design. All of these were error under both state law and the Due Process, Equal Protection, and fair jury trial provisions of the United States Constitution.

The Court of Appeal found these errors to be non-prejudicial. (Slip Opn. at pp. 15-16, 20-21.) The Court of Appeal not only failed to use the federal constitutional standard, but it also failed to take account of the trial court's assessment of just one of these errors (a failure that was pointed out to the Court of Appeal in the petition for rehearing).

The Court of Appeal's opinion concluded primarily that the errors were harmless because "the jury rejected" the expert evidence presented by the defense. (Slip Opn. at p. 15, 21.) However, this conclusion begs the question. Obviously, the jury did reject the expert's opinion, but the relevant inquiry is whether it was the inadmissible evidence and improper instructions that *contributed to* the rejection. The Court of Appeal failed to address this question.

This failure was particularly significant because the trial judge made very clear that the answer to the question is affirmative. For the trial judge characterized the evidence of the August 30th incident as "highly relevant" and "important" for the jury. (RT-II at pp. 7:3, 6:11.) Just as the Court of Appeal gave deference to the trial court's determination as to the admissibility of evidence (Slip Opn. at pp. 7, 10), so also was it required to give deference to the trial court's determination as to what admitted evidence was "important" and "highly relevant" to the jury. And if just this one item of inadmissible evidence was "important" and "highly relevant" for the jury, then it is at least reasonably likely that all of the errors cumulatively caused the jury to reject the defense expert's testimony.

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

See Appendix A

Do you have an attorney for this petition? Yes____ No X

If you do, give the name and address of your attorney:

N/A

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on 3-22-08 Michael Glenn Brayton

Date Signature of Petitioner

(Rev. 6/02)

Michael Braxton
Inmate No: T-26973
California Correctional Center
P.O. Box 2210
Susanville, CA 96127

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL G. BRAXTON,

Plaintiff,

vs.

KATHY PROSPER, Warden,

Defendant.

CASE NO. _____

PRISONER'S APPLICATION TO PROCEED IN FORMA PAUPERIS

I, Michael Braxton, declare, under penalty of perjury that I am the plaintiff in the above entitled case and that the information I offer throughout this application is true and correct. I offer this application in support of my request to proceed without being required to prepay the full amount of fees, costs or give security. I state that because of my poverty I am unable to pay the costs of this action or give security, and that I believe that I am entitled to relief.

In support of this application, I provide the following information:

1. Are you presently employed? Yes ____ No XX

If your answer is "yes," state both your gross and net salary or wages per month, and give the name and address of your employer:

Gross: 0 Net: 0

Employer: None as of current

If the answer is "no," state the date of last employment and the amount of the gross and net salary

and wages per month which you received. (If you are imprisoned, specify the last place of employment prior to imprisonment.)

Not employed prior to incarceration

2. Have you received, within the past twelve (12) months, any money from any of the following sources:

a. Business, Profession or self employment — Yes ___ No XX

b. Income from stocks, bonds, or royalties? — Yes ___ No XX

c. Rent payments? — Yes ___ No XX

d. Pensions, annuities, or life insurance payments? — Yes ___ No XX

e. Federal or State welfare payments, Social Security or other government source? — Yes ___ No XX

If the answer is "yes" to any of the above, describe each source of money and state the amount received from each.

N/A

3. Are you married? Yes ___ No XX

Spouse's Full Name: N/A

Spouse's Place of Employment: N/A

Spouse's Monthly Salary, Wages or Income:

Gross $ 0 Net $ 0

4. a. List amount you contribute to your spouse's support : $ N/A

b. List the persons other than your spouse who are dependent upon you for support

and indicate how much you contribute toward their support. (NOTE: For minor children, list only their initials and ages. DO NOT INCLUDE THEIR NAMES.).

No Children

5. Do you own or are you buying a home? Yes ____ No XX

Estimated Market Value: $ 0 Amount of Mortgage: $ 0

6. Do you own an automobile? Yes ____ No XX

Make N/A Year N/A Model N/A

Is it financed? Yes ____ No XX If so, Total due: $ 0

Monthly Payment: $ 0

7. Do you have a bank account? Yes ____ No XX (Do not include account numbers.)

Name(s) and address(es) of bank: N/A

Present balance(s): $ _____

Do you own any cash? Yes ____ No XX Amount: $ 0

Do you have any other assets? (If "yes," provide a description of each asset and its estimated market value.) Yes ____ No XX

None

8. What are your monthly expenses?

Rent: $ 0 Utilities: 0

Food: $ 0 Clothing: 0

Charge Accounts:

Name of Account	Monthly Payment	Total Owed on This Acct.
No Accounts	$	$
	$	$
	$	$

9. Do you have any other debts? (List current obligations, indicating amounts and to whom they are payable. Do not include account numbers.)

No other obligations

10. Does the complaint which you are seeking to file raise claims that have been presented in other lawsuits? Yes ___ No XX

Please list the case name(s) and number(s) of the prior lawsuit(s), and the name of the court in which they were filed.

N/A

I consent to prison officials withdrawing from my trust account and paying to the court the initial partial filing fee and all installment payments required by the court.

I declare under the penalty of perjury that the foregoing is true and correct and understand that a false statement herein may result in the dismissal of my claims.

3-22-08 Michael Glenn Braxton

DATE SIGNATURE OF APPLICANT

Case Number: _____

CERTIFICATE OF FUNDS

IN

PRISONER'S ACCOUNT

I certify that attached hereto is a true and correct copy of the prisoner's trust account statement showing transactions of _____ for the last six months at

[prisoner name]

_____ where (s)he is confined.

[name of institution]

I further certify that the average deposits each month to this prisoner's account for the most recent 6-month period were $ _____ and the average balance in the prisoner's account each month for the most recent 6-month period was $_____.

Dated:_____ _____

[Authorized officer of the institution]

PROOF OF SERVICE BY MAIL BY PRISONER "IN PRO PER"

I hereby certify that I am over 18 years of age, that I am representing myself, and that I am a prison inmate.

My prison address is:

CALIFORNIA CORRECTIONAL CENTER. P.O BOX 2210

SUSANVILLE CA 96127

On the "date" specified below, I served the indicated document on opposing counsel in this action at their business address by (check one):

[X] Giving the document to a correctional officer with directions to file the document with the court ("prison mailbox rule")

[X] Placing the document in an envelope, which was then sealed and postage fully paid thereon, and thereafter I caused the document to be mailed by first-class mail, with postage affixed.

Case Name: BRAXTON [redacted] V. PROSPER

Date: 3-22-08

Document(s) Served (check one or both):

[X] Petition for Writ of Habeas Corpus

[ ] Others (list):

Service Upon (opposing counsel's name and address):

I declare under penalty of perjury that the foregoing is true and correct.

Executed at SUSANVILLE (city), California.

PRINTED NAME: MICHAEL GLENN BRAXTON

SIGNATURE: Michael Glenn Braxton

Michael Braxton T-26973
California Correctional Center
P.O. 2210 - L-2-102-L
Susanville, Ca 96127.

Legal Mail

United States District Court
For The Northern District
C/O Clerk of Court.
U.S Courthouse
450 Golden Gate ave.
San Francisco, 94102-3483.

Legal Mail

STATE PRISON